United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1420

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, a/k/a ELIZABETH JANE YOUNG CHIN,

Appellants.

On Appeal from the United States District Court for the Eastern District of New York.

PETITION FOR RE-ARGUMENT OR RE-HEARING EN BANC

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TABLE OF AUTHORITIES

PETITION FOR RE-ARGUMENT OR RE-HEARING EN BANC

Kenneth Raymond Chin, petitioner herein, respectfully applies pursuant of Rules 35 (c) and 40 (a) of the Federal Rules of Appellate Procedure for re-argument or re-hearing en banc of the decision of this Court rendered March 21, 1977 (TIMBERS, C.J., MESKILL, C. J., MOTLEY, D.J.) affirming a judgment of conviction for aiding and abetting in the transportation and receipt of a firearm (18 U.S.C. § 922 (a) (3), § 2) entered in the United States District Court for the Eastern District of New York (Mishler, C.J.).

SUMMARY OF ARGUMENT

Petitioner seeks re-argument for the reason that the Court has interpreted an enactment of Congress to have a meaning which conflicts with the very words of the statute, and that, in affirming the transportation count, the Court relied upon facts not in the record before it.

Petitioner also suggests re-hearing en banc to give this Court an opportunity to consider the effect of the interpretation of the statute in issue. Petitioner contends that the statute has been rendered

unconstitutionally vague because the Court has held that the words in the statute do not mean what they say and have, in fact, no meaning.

REASONS FOR GRANTING THE PETITION

Chin asks this Court to reconsider his due process argument based on insufficiency of evidence on the transportation count. He stands convicted of having aided and abetted in the transportation of a firearm which was purchased by another person in California at a time when it is undisputed that he was in New York. The lack of proof connecting Chin to the subject of this count, i. e., the weapon, is appalling. There is no direct proof that he knew the co-defendant intended to or did purchase this weapon in California or possessed it in New York. The Government's "circumstantial" case is based on the fact that the two defendants shared an apartment and an interest in firearms. This Court found also noteworthy the fact that the two defendants had jointly possessed a completely different weapon at another time.

Even if this Court found the conviction justifiable on this paucity of facts, it has completely disregarded the fact that the jury was instructed that

it might find guilt upon a finding of possession. The jury was charged

> There is no evidence as I have said before, that the defendant Chin in any way participated in the transportation of any of the weapons into the State of New York.
>
> . . . . . .
>
> But if you find that the weapon was transported from California into New York you may infer from that possession that the defendant Chin participated in the transportation of that weapon. A-94,99, emphasis supplied

To accord Chin his day in court, this Court must consider whether, under the circumstances of this case, a finding of guilt based on the inferences drawn from possession comports with due process.

At oral argument, facts were discussed which were not before the jury. The possible illegality under state law of possession of certain of the weapons, the extent of the "arsenal" recovered pursuant to the search, the contents of a statement allegedly made by Chin were all discussed and considered by this Court. None of this evidence was before the jury, nor properly before the Court. Cook v. United States, 365 F.2d 565 (9 Cir. 1966).

The purpose of an appeal from judgment is not to justify a conviction, but to ascertain whether the

conviction rests on sufficient, legally adduced evidence. It is not appropriate for the Government to attempt to re-try its case by presenting new evidence. The prosecutor and the Court may know, or feel that a crime was committed, but our system of justice commands that a person be found guilty only upon sufficient proof of the crime with which he was charged. If the United States Attorney was cognizant of possible State violations, the proper course would be to refer such violations to the proper authorities. The words of this Court in United States v. Tavoularis are most apposite:

> Our system of administering justice requires that a defendant, no matter how guilty he may be of some crime, cannot be convicted unless there is proof beyond a reasonable doubt that he committed the particular crime with which he is charged. United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975).

Due process is not satisfied by the Government having convicted a person suspected of having committed a crime; it requires a charge and sufficient evidence on the record to support that charge.

The record must stand as it was presented to and considered by the jury. This record stands as follows: The Court below stated that there was no evidence the Chin had transported the weapon. However, the jury was

told it could find guilt on inferences based on a finding of possession of the weapon. It is upon these facts that this Court's opinion must rest.

Affirmance cannot rest upon a theory of guilt presented for the first time on appeal. The Government's switch from a theory of aiding and abetting in the transport to causing the transportation, introduced to this case in its brief and accepted by this Court at oral argument is completely unjustified.

A careful reading of the charge will reveal that the Trial Court merely read § 2(b) to the jury--no definition nor discussion of this genre of criminal liability appears in the charge. A mere reading of this section is insufficient to charge this form of criminal liability. United States v. Bryant, 461 F.2d 912 (6Cir. 1972). This Court's acceptance of that mere reading is all the more surprising because the entire theory was first introduced on appeal.

At trial, the Government asked the jury to find Chin guilty of aiding and abetting. In the Court of Appeals, the Government and this Court agreed that he was guilty of causing the crime to be committed. Once again, we are not in this Court to justify the conviction, but to review the case as tried. The facts in the record do not

support a finding of guilt beyond a reasonable doubt. A similar ploy of the United States Attorney was recently condemned by this Court (United States v. Robinson, 545 F.2d 301 (2d Cir. 1976)); it should not be accepted here.

B. The receipt count.

The gravamen of Chin's challenge to the receipt count is the failure of the Trial Court of charge, or the Government to prove, a violation of 18 U.S.C. § 922 (a) (3). Congress has defined that crime as follows:

> (a) It shall be unlawful . . .
> (3) for any person . . .to transport or receive in the State where he resides . . .any firearm purchased or otherwise obtained by such person outside that State. . .
> Title 18 U.S.C. § 922.

The Trial Court defined the crime to be merely receipt with knowledge, stating that guilt is predicated on a finding that he

> received the weapon and that when he received the weapon he knew that the weapon was unlawfully transported into the State of New York. A-100.

Seizing upon this erroneous charge, the Government argued that the evidence was sufficient to find receipt with knowledge.

It is hard to imagine a clearer example of plain error. The crime created by Congress contains elements not charged by the Court and not proven by the Government, to wit, "purchased or otherwise obtained by such person." Yet this Court affirmed, stating that Congress did not intend this particular crime of receipt to differ from the other receipt crimes in Title 18. The words must therefore mean nothing. By affirming this conviction, this Court holds that receipt from another person with knowledge of prior illegal transportation is a crime, in spite of Congress' definition of the crime to be receipt of a weapon which had been purchased or otherwise obtained by the person who receives it. These words of Congress leave no room for semantic debate.

The primary source for ascertaining the meaning of a statute is the statute itself. If the words are unambiguous, the meaning clear, the Court's task is at an end. United States v. Sullivan, 332 U.S. 689 (1948). An act should be read "so as . . .to give full effect to its plain terms." Lamar v. United States, 241 U.S. 103, 112. A court "should not depart from an act's words and context." Pierce v. United States, 314 U.S. 306,311,312 (1941).

Each word of a statute is "given a natural meaning." Wharton's Criminal Law and Procedure, § 19.

This Court has not rejected defendant's choice of interpretation of the phrase placed in the statute by the legislators, it simply rejects the phrase. The entire qualifying phrase limiting the scope of the proscribed activity has been discarded.

We do not have a situation in which a statute is ambiguous and therefore is amenable to one of two or many constructions. The words could not be more concrete. In this situation, the Court does not have the power or the right to re-write the statute. The words are there, the meaning plain. Had Congress intended simple receipt to be a crime, the words to make it so were available. Indeed, Congress managed to define such a crime within the same section of the law, i.e. Title 18 U.S.C. § 922 (h).

Supplementing the general rules of construction with the specific rules to be applied in a criminal case, the decision herein is seen as unwarranted and capricious.

> It is axiomatic that statutes creating and defining crimes cannot be extended by intendment.
>
> Wharton's Criminal Law and Practice, § 19.

> The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within

its reach; Viereck v. United States, 318 U.S. 236, 243 (1940).

Certainly it is inconsistent with the principle of narrow interpretation to expand the purview of a Congressional statute when such expansion requires the Court to ignore the very words of the statute.

It is suggested that this Court re-hear this appeal en banc. We respectfully submit that the affirmance of this conviction upon the record here presented will open the way to unnecessary constitutional challenge to this statute.

A criminal statute's constitutional validity depends on its giving the general public fair warning of the proscribed conduct. Bouie v. City of Columbia, 378 U.S. 347. If the very words of a statute do not mean what they say and, in fact, have no meaning, the statute fails to give fair warning. By eliminating a stated element, this Court is creating constitutional pitfalls where Congress has created none. By giving to the statute an interpretation other than that suggested by the words themselves, the proscribed conduct is rendered vague.

CONCLUSION

For the above stated reasons, reargument and/or re-hearing en banc should be granted, and the convictions reversed.

Respectfully submitted,

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D FEDERAL COURT
SECOND JCIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

KENNETH RAYMOND CHIN, and ELIZABETH JANE YOUNG a/k/a ELIZABETH JANE YOUNG CHIN,
Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street; New York, New York

That on the 4th *day of* April, *19* 77 *at* 225 Cadman Plaza
Brooklyn, N.Y.

deponent served the annexed *upon*

Petition

U.S. Atty. Eastern Dist.
~~XXXXXXXX~~ David Trager

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this 4th
day of April, *19* 77

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0428950
Qualified in New York County
Commission Expires March 30, 1977